APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 87-5193

ORDER—Filed January 13, 1989

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, - - - - - *Plaintiff-Appellant,*

v.

KENTUCKY STATE POLICE DEPARTMENT, et al., - - - - - - *Defendants-Appellee,*

AND

BOARD OF TRUSTEES OF KENTUCKY RETIREMENT SYSTEM, - - *Defendants-Third Party Plaintiffs,*

v.

LEO REYNOLDS, et al., - - *Third Party Defendants*

BEFORE: ENGEL, Chief Judge; KENNEDY, Circuit Judge, and EDWARDS, Senior Circuit Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of the court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Engel adheres to his dissent.

Entered by Order of the Court

(s) Leonard Green
Leonard Green, Clerk

APPENDIX B

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 87-5193

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Decided and Filed November 1, 1988

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, - - - - - *Plaintiff-Appellant,*

v.

KENTUCKY STATE POLICE DEPARTMENT, et al., - - - - - - *Defendants-Appellees.*

On Appeal from the United States District Court for the Eastern District of Kentucky

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Before: ENGEL, Chief Judge;* KENNEDY, Circuit Judge; and EDWARDS, Senior Circuit Judge.

EDWARDS, Senior Circuit Judge, delivered the opinion of the court, in which KENNEDY, Circuit Judge, joins. ENGEL, Chief Judge, (p. 9) delivered a separate dissenting opinion.

EDWARDS, Senior Circuit Judge. The EEOC is plaintiff and appellant in this action in which certain state police officers joined by the EEOC are appealing a decision en-

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*The Honorable Albert J. Engel assumed the duties of Chief Judge effective April 1, 1988.

tered by the United States District Court for the Eastern District of Kentucky. At issue is a Kentucky statute establishing a mandatory retirement age of 55 years. The plaintiffs in this action contend that the Kentucky statute, by establishing the mandatory 55 age limit for employment, violated the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq. Defendants contend that the 55-year limit is a Bona Fide Occupational Qualification.

The United States District Court took testimony from both parties in a three-day bench trial and then held for the defendants holding the 55-year limit to be a bona fide occupational qualification.

Some of the essential facts of the dispute are set forth in the following paragraph from the District Judge's opinion:

> This is a close case. The court carefully considered the testimony and the arguments submitted by both sides before concluding that defendant met its burden of proving that cardiovascular fitness and aerobic capacity are traits reasonably necessary to the performance of a Kentucky State Police officer's job. After long periods of job-related sedentary activity, driving a police car, or investigating crimes, an officer may be called upon to engage in periods of highly stressful activity. That police officers sometimes must pursue a fleeing suspect on foot or subdue a captured suspect is not merely a product of the Hollywood imagination. Indeed the possibility of such occurrences is undisputed in this case.

We believe this reasoning is sound on the statements related therein. But it does not take into account the total and the crucial facts of this case.

This record shows that Kentucky State Police has no program for regular testing of all of its officers for physical

fitness.[1] At one time, Commissioner Elkins testified Kentucky State Police tried giving physical fitness tests to all members of the force but abandoned the practice. Elkins explained "it was putting people in the hospital rather than keeping them on the road working."

The record also discloses that Kentucky State Police permits officers to remain on the job in spite of known heart attacks or by-pass surgery. Equally important, in the facts with which we are confronted, is the fact that Kentucky State Police has no program for testing or maintaining the physical or the cardiovascular health of its officers. In fact, the record discloses that one veteran of the force died on patrol in his cruiser as a result of his fourth heart attack.

It is not, of course, the function of this court to tell the Kentucky State Police Commissioner how to operate its police force.

It is however, required of this court that we define whether or not Kentucky's "mandatory retirement age of 55 years" is a bona fide occupational qualification. The record in ths case convinces us that it is not. First, this record demonstrates that the Kentucky State Police Force has no program for testing the fitness of its officers either as to aerobic or cardiovascular health. We recognize that there as such fitness tests for a "special response team." Each Post has one such team. Each member of that team is given regular physical fitness tests including timed mile run in full gear, push-ups and sit-ups.

Still further bearing on the bona fides of the Kentucky State Police program are the facts, that the agency repeatedly permitted officers under the age of 55 who had

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[1]Each Post, however, does have a "special response team" which is subject to vigorous physical tests.

known health problems including heart conditions to remain on the job with no diminution of duties, and that officers who had had heart attacks or by-pass surgery had been retained on the force. A 25-year veteran of the force, Eugene Coffey, died of his fourth heart attack at the age of 49 while on routine patrol in his cruiser.

One of the state expert witnesses, Dr. Lind, a physiologist, testified that an aerobic capacity of three liters was the number required for successful performance of all Kentucky State Police personnel. But on cross-examination, Dr. Lind admitted that most of the women officers and some competent Kentucky State Police male officers are unable to meet the three liter aerobic capacity test.

EEOC's expert witness was Dr. Pollock, a physiologist, and while he admitted that aerobic capacity is related to age, he also cited other factors such as genetics, general health, and lifestyle habits, including smoking, alcohol consumption and amounts of exercise. EEOC's other expert, Dr. Leon, a cardiologist, stated there was an increasing risk of coronary artery disease as people get older. He estimated the risk factor as being that six people out of 100 over the age of 55 would have a coronary event within 10 years. Dr. Leon also testified that if persons who smoked were eliminated, physical examinations could tell with almost 100% accuracy who would be at risk of a coronary event within the next 10 years of life.

On appellate review of the District Court's finding in an employment discrimination case, we are required not to set aside findings of fact unless on appeal we can say that they are clearly erroneous and, of course, we are required to give due regard to the findings of the trial judge on the credibility of witnesses. See F.R.C.P. 52(a) and *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 573 (1985).

We turn now to the actual language of the statute which controls this case. The Age Discrimination in Employment Act, 29 U.S.C. § 623 states as follows:

> (a) It shall be unlawful for an employer —
>
> (1)to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
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> * * *
>
> (f) It shall not be unlawful for an employer, employment agency, or labor organization —
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business. . . .

The Supreme Court of the United States set forth the purposes of the Act just quoted in its decision in *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400, 410-411 (1985). In *Criswell, the Supreme Court* said:

> Increasingly, it is being recognized that mandatory retirement based solely upon age is arbitrary and that chronological age alone is a poor indicator of ability to perform a job. Mandatory retirement does not take into consideration actual differing abilities and capacities. Such forced retirement can cause hardships for older persons through loss of roles and loss of income. Those older persons who wish to be re-employed have a much more difficult time finding a new job than younger persons. Society, as a whole, suffers from mandatory retirement as well. As a result of manda-

> tory retirement, skills and experience are lost from the work force resulting in reduced GNP. Such practices also add a burden to government income maintenance programs such as social security. H.R. Rep. No. 95-527, pt. 1, p. 2 (1977).

The *Criswell* case established that under the ADEA an employer must first establish that job qualifications are "*reasonably necessary* to the essence of his business." *Criswell*, 472 U.S. at 413 (quoting *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F. 2d at 224, 236 (5th Cir. 1976)). (Emphasis in original). If successful in this endeavor, the employer must then show that it "is compelled to rely on age as a proxy for the safety-related job qualifications validated in the first inquiry." 472 U.S. at 414.

The record in this case is similar to that in the case involving a Pennsylvania mandatory retirement statute for its state police. The court concluded:

> The factual findings supporting the district court's treatment of the first prong of the BFOQ defense do not include the determination that the department in fact presently requires all state troops to maintain a minimum level of health and fiitness. Nor would the record support such a finding. This factual deficiency convinces us that the district court committed clear error in concluding that the PSP had demonstrated a bona fide occupational qualification reasonably necessary to its business. . . . Until minimum standards are developed, implemented and enforced, the PSP cannot justify its mandatory retirement law by relying on good health and physical conditioning as BFOQs reasonably necessary to PSP business.

EEOC v. *Pennsylvania*, 829 F. 2d 392, 395 (3rd Cir. 1987).

We recognize that the District Court in this case relied on *EEOC* v. *City of East Providence*, 798 F. 2d 524 (1st Cir. 1986).

We believe its assumptions, however, are contrary to the legislative history of ADEA. Rejecting the *East Providence* case, the Third Circuit said:

> The *East Providence* court wrote:
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> > The ADEA was intended to be used as a shield to protect older employees from discriminatory employment practices, not as a sword to compel employers concerned with public safety to perfect their procedures for assuring maximum physical fitness of younger employees.
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> *Id.* at 529. The court stated that in establishing a mandatory retirement law to achieve its fitness goal, the city would rely on its belief that most younger officers will meet the necessary minimums. *Id.* at 529, n. 4.
>
> We disagree. We believe this is precisely the kind of employment discrimination that Congress sought to eliminate by enacting the ADEA. Before a characteristic can be a reasonably necessary BFOQ, it must be a trait that the employer at least attempts to require of employees of all ages. In any event, the district court did not find that most younger officers possess the purported BFOQs. And, in fact, the record suggests the contrary.

EEOC v. *Pennsylvania*, 829 F. 2d 392, 396 (3rd Cir. 1987).

See also *Heiar* v. *Crawford, Wisconsin*, 746 F. 2d 1190, 1198 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985), but see *EEOC* v. *Missouri Highway Patrol*, 748 F. 2d (8th Cir. 1984), *cert. denied*, 474 U.S. 828 (1985).

We recognize that ADEA has recently been amended to permit police and firefighters to be mandatorily retired until 1993. Congress, however, explicitly exempted all causes of action arising under ADEA before January 1, 1987 from this change.

There is no doubt, of course, that Congress can authorize mandatory age limits for law enforcement personnel in the various states. We read *Johnson* v. *Mayor and City Council of Baltimore*, 472 U.S. 353, 370 (1985), as clear indication that the Supreme Court does not believe Congress has done so in language applicable to our instant case.

The judgment of the District Court holding that the Kentucky State Police 55-year age limit is a bona fide occupational limitation is reversed. The case is remanded to the District Court for any further proceedings which may be required.

ENGEL, Chief Judge, dissenting. I respectfully dissent. Contrary to the conclusion of the majority, I agree with United States District Judge Bertelsman that the Kentucky State Police Department has adequately demonstrated a bona fide occupational qualification in this case.

In *EEOC* v. *Tennessee Wildlife Resources Agency*, No. 86-5539/6294, a companion case which we heard with this case, plaintiffs challenged the mandatory retirement age for Tennessee conservation officers. In that case, despite the fact that mandatory retirement would protect older conservation officers from the dangers of working alone and far from any assistance, I concurred in invalidating the mandatory retirement policy; the record there disclosed inconsistent aplication of the policy and revealed a lack of bona fides by the State of Tennessee.

This case, however, discloses no such lack of good faith by the Kentucky State Police. Accordingly, I would affirm for the reasons set forth in Judge Bertelsman's district court opinion of December 17, 1986.

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

Civil Action No. 84-62

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION - - - - - - - *Plaintiff*

v.

KENTUCKY STATE POLICE DEPARTMENT, et al. - - - - - - - - - *Defendants*

OPINION—Filed December 17, 1986

The Equal Employment Opportunity Commission (EEOC) instituted the present action under the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. §623. Certain involuntarily retired state police officers are also named as parties herein. Named as defendants were Kentucky State Police Department, Kentucky Secretary of Justice, Commissioner of the Kentucky State Police Department, Board of Trustees of Kentucky Retirement Systems, and the Commonwealth of Kentucky. The EEOC claimed that the Kentucky State Police mandatory retirement age of 55 years, prescribed by KRS 16.505(15), violated the ADEA. The defendants countered that the 55 year limit is a Bona Fide Occupational Qualification (BFOQ).

The court, having heard the testimony of both parties in a three-day bench trial, holds that age is a BFOQ for Kentucky State Police officers; and, therefore, the court enters judgment for the defendants.

The court makes the following findings of fact and conclusions of law:

The purpose of the ADEA is to encourage employers to make employment decisions based on actual qualifications rather than on the arbitrary distinction of age, *Johnson* v. *Mayor and City Council of Baltimore*, — U.S. —, 105 S. Ct. 2712 (1985). In *Western Airlines* v. *Criswell*, — U.S. —, 105 S. Ct. 2743 (1985), the employer may make age-based distinction where age is a BFOQ.

To prove age is a BFOQ, as the State Police did in the instant case, the employer must prove: (1) that the job qualification at issue (here, cardiovascular fitness and aerobic capacity) is "reasonably necessary" to the "essence" of its business (here, law enforcement), and (2) that the employer has "reasonable cause" to believe that substantially all people over the mandatory retirement age cannot safely perform the duties of the job or that it would be highly impractical to deal with class members on an individual basis. *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F. 2d 224 (5th Cir. 1976), adopted by the Sixth Circuit in *Tuohy* v. *Ford Motor Co.*, 675 F. 2d 842 (6th Cir. 1982). These are questions of fact.

While the burden is on the defendant to prove that age is a BFOQ, where, as here, the essence of defendant's business is safety-related, the employer need only show a "minimal increase in risk of harm" to establish a BFOQ defense. *Hodgson* v. *Greyhound Lines*, 499 F. 2d 859, 863 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975).

This is a close case. The court carefully considered the testimony and the arguments submitted by both sides before concluding that defendant met its burden of proving that cardiovascular fitness and aerobic capacity are traits reasonably necessary to the performance of a Kentucky State Police officer's job. After long periods of job-related sedentary activity, driving a police car, or investigating

crimes, an officer may be called upon to engage in periods of highly stressful activity. That police officers sometimes must pursue a fleeing suspect on foot or subdue a captured suspect is not merely a product of the Hollywood imagination. Indeed, the possibilty of such occurrences is undisputed in this case.

Further, although the Kentucky State Police has not been exemplary in terms of monitoring the health of its employees, each supervisor on the Force is responsible for the fitness of his or her subordinates. At this Frst Circuit recently held,

> "a police force's failure continuously to monitor physical standards does not, standing alone, compel a finding that physical fitness is not a reasonably necessary job qualification."

EEOC v. *City of East Providence*, No. 86-1026 (First Circuit, August 15, 1986). Even though, unlike the New Jersey State Police, the Department here has no in-service fitness screening, this court must agree with Federal Judge Barry when she held, on facts almost identical to those at hand, that fitness is a BFOQ for being a police officer. *EEOC* v. *New Jersey State Police*, 620 F. Supp. 977, 983 (D. N.J. 1985). Many of the same witnesses testified in this case as in the *New Jersey* case.

While a wide range of individual physical abilities exists within any age group, and while diet and exercise programs prevent some heart disease and maintain aerobic capacity, all experts agree that there is a significant increase in coronary risk with age.

Regarding aerobic capacity, this court finds aerobic fitness to be reasonably necessary for the safe conduct of the job of a Kentucky State Police officer. Aerobic capacity is the ability of the muscles to use oxygen; it determines the

strength and endurance of the body. While the requisite aerobic capacity will vary with body weight, height, and gender, and while health aerobic capacity can be maintained through rigorous fitness programs, defendant has met its burden of persuasion and proved that substantially all people over 55 lack the aerobic capacity necessary to perform as Kentucky State Police officers. Dr. Lind testified that aerobic capacity declines "almost linearly" with age. Certainly, plaintiffs proved that individual athletes can maintain their aerobic capacity well into their 80s through continuous training and competition. Further, plaintffs successfully demonstrated that maximum aerobic capacity, VO2 max., can be accurately tested. Such is not the case for cardiovascular disease.

Cardiovascular disease is often asymptomatic until a first, often fatal, coronary event. Even Dr. Pollock, the plaintiffs' own expert, found a distinct increase in coronary risk with age when he studied the Dallas area police force. Dr. Antlitz testified to "a definite relationship between age and coronary artery obstruction or disease." He further testified that, according to a 1950 study, "somewhere around 55 they have 70 plus — 75 percent obstruction of one or more coronary arteries." He noted that the number of deaths due to ischemic heart disease skyrockets as people reach their late 50s. Indeed, one expert testified that, by age 55, almost 80% of the population has at least a 50% obstruction of at least one coronary artery. Although this is not as important for sedentary jobs, this coronary disease might well lead to a coronary incident during the times of stress which the State Police encounter.

Further, although the use of various tests in combination might identify certain high-risk individuals, the court finds that non-intrusive testing for cardiovascular disease is not sufficiently advanced to be a reliable substitute for the mandatory retirement age. There is no test that will

decisively determine that a specific individual does not have significant coronary artery disease.

Finally, and significantly, the court finds the recent amendment to the ADEA to be indicative of congressional policy in this area. While eliminating the abilities of most employers to institute mandatory retirement plans for employees of any age, the Amendment specifically exempts law enforcement and fire fighting personnel from coverage.

> "SEC. 3. EMPLOYMENT AS FIREFIGHTING OR LAW ENFORCEMENT OFFICER.
>
> (a) GENERAL RULE. — Section 4 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623) is amended by adding at the end thereof the following new subsection: '(i) It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken
>
> '(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and
>
> '(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this Act.
>
> (b) TERMINATION PROVISION. — The amendment made by subsection (a) of this section is repealed December 31, 1933."
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> * * *
>
> "SEC. 7. EFFECTIVE DATE: APPLICATION OF AMENDMENTS. . . .

> (b) EFFECT ON EXISTING CAUSES OF ACTION. — The Amendments made by sections 3 and 4 of this Act shall not apply with respect to any cause of action arising under the Age Discrimination in Employment Act of 1967 as in effect before January 1, 1987."

H.R. 4154, 99th Cong. 2d Sess. 144 Cong. Rec. — House, H 11280 (Oct. 17, 1986). There the House approved the Senate version of H.R. 4154. The bill has yet to be printed in its final form.

The Federal Government has always maintained a mandatory retirement age for Federal law enforcement officers. Now the Congress has expanded that power to state and local governments, at least for another seven years. That expansion specifically was intended to prevent suits like the instant action and to defer to state legislation to determine what is in the best interest of the public, pending a congressionally mandated EEOC/Secretary of Labor study to determine whether physical and mental fitness tests "are valid measurements of the ability and competency of police officers and firefighters." (Section 5 of the Amendments to the ADEA). Although the bill does not take effect until January, allowing the named plaintiffs a recovery here would be tantamount to a windfall. If we held otherwise, the individual plaintiffs, involuntarily retired officers, could return to work tomorrow and retire the day after tomorrow with substantial back pay and increased retirement. The court believes that the recent amendment is indicative of a legislative intent that this should not be permitted.

As we have said, it was a very close question under the ADEA, as it existed when this action was filed, whether a mandatory retirement age for law enforcement officers was a BFOQ. The ADEA was at least philosophically inconsistent with the Congressional policy of having a man-

datory retirement age of 55 for federal officers, although the Supreme Court held that Congress had a right to be inconsistent in this area. *Johnson* v. *Mayor and City Council of Baltimore*, — U.S. —, 105 S. Ct. 2717 (1985).

Now Congress while expending the scope of the Act as to almost everyone else has provided seven more years to study the problem of mandatory retirement for law enforcement personnel. Despite the saving clause for existing causes of action, the court regards this as being reflective of pre-existing legislative intent to regard mandatory retirement for police officers as BFOQ until more returns are in. Although subsequent amendments to a statute "must be weighed with extreme care," they may be utilized "in the search for legislative intent." *Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 666, n.8 (1980); 73 Am. Jur. 2d §178.

For all the foregoing reasons, the court holds that the Kentucky State Police mandatory retirement age is a BFOQ. A separate Judgment will enter dismissing the complaint herein.

Entered this 17th day of December, 1986.

(s) William O. Bertelsman
William O. Bertelsman, Judge